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November 13, 2013

In re South African Apartheid Litigation
02 MDL 1499 (SAS)

Dear Judge Scheindlin:

We represent IBM in the above-captioned matter. We submit this letter on behalf of IBM and Ford Motor Company (collectively, “defendants”) to advise the Court that on November 7, 2013, the Second Circuit issued an order (attached hereto) denying plaintiffs’ petition for panel rehearing and rehearing en banc. In light of the denial of rehearing and of the guidance this Court provided at the September 24, 2013, pre-motion conference, defendants respectfully request that the Court enter judgment in their favor.

Defendants maintain that judgment in defendants’ favor is warranted for the reasons outlined in their prior letter. *See* ECF No. 236. Indeed, as the Court noted on September 24, “the Circuit has already dictated the opinion on extraterritoriality and corporate liability” in defendants’ favor. Hr’g Tr. 16; *see also Balintulo v. Daimler AG*, 727 F.3d 174, 193 (2d Cir. 2013) (stating that the Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), “plainly forecloses the plaintiffs’ claims as a matter of law” because all the relevant conduct in the case occurred abroad); *id.* at 191 n.26 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010)) (reiterating the law of the Second Circuit that “corporations are not proper defendants under the ATS in light of prevailing customary international law”). However, this Court explained at the September 24 conference that “it may be best to see what the Circuit does with the rehearing en banc”. Hr’g Tr. 16.

Now that the Second Circuit has denied rehearing, and in light of this Court’s statements at the September 24 conference, defendants respectfully submit that no further briefing is required, and that the Court should enter judgment in favor of defendants on the grounds that (i) the relevant conduct that plaintiffs allege occurred abroad, *Kiobel*, 133 S. Ct. at 1669; (ii) defendants are corporations and therefore not subject to ATS liability under the law of this Circuit, *Kiobel*, 621 F.3d at 149; and (iii) the complaints fail to allege facts satisfying the mens rea of aiding-and-abetting liability under the ATS, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). If, however, the Court believes that either a second pre-motion

conference or formal briefing is warranted, defendants are available for such a conference or request that the Court simply enter a briefing schedule for a Rule 12(c) motion for judgment on the pleadings.

Respectfully submitted,

Keith Hummel/mrk

Keith R. Hummel

The Honorable Shira A. Scheindlin
United States District Judge
Southern District of New York
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